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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and **NATHANIEL HENDERSON**, on their own behalf and on behalf of all others similarly situated, and **THOMAS TURNER** and **GARY FAULK**, on their own behalf and on behalf of all others similarly situated,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal services and defender offices in the United States. Founded in 1911, it includes over 4,000 individual and professional members who have a major concern with safeguarding the rights of criminal defendants and, in particular, indigent criminal defendants.

The NLADA is disturbed at the often lengthy pre-trial detention of criminal defendants. The situation is even more disturbing where there has been no judicial determination concerning the basis for the criminal accusation which has resulted in the incarceration. Pretrial detention even without a judicial determination of the basis for the accusation is obviously more likely for the indigent, who is unable to post bond, than for the rich. Because we believe incarceration without a judicial imprimatur violates the constitutional rights of indigent defendants, we file this brief in support of respondents.

NLADA files this Amicus Curiae Brief pursuant to Supreme Court Rule 42(2). The written consent of counsel for all parties has been secured.

STATEMENT OF THE CASE

Amicus Curiae adopts respondents' Statement of the Case.

STATEMENT OF THE FACTS

Amicus Curiae adopts respondents' Statement of the Facts.

ISSUE PRESENTED

Whether the due process clause and the constitutional prohibition against unreasonable seizures of the person prohibit the pretrial incarceration of accused persons without a judicial determination of probable cause for their arrest.

ARGUMENT

THE INCARCERATION OF RESPONDENTS WITHOUT ANY JUDICIAL DETERMINATION OF PROBABLE CAUSE AFTER A HEARING VIOLATES THEIR RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

In view of the arguments set forth by petitioner, it is important to note initially what the issues are and what they are not. Respondents, representing a class of pretrial detainees, contest the right of the State to hold them in detention without having provided a hearing before a neutral magistrate to determine whether there is probable cause for the detention. Respondents do not contest the adequacy of the information filed by the State's Attorney as a jurisdictional basis for the continuation of the prosecution against them. Thus, most of the cases relied upon by petitioner are inapposite, since they deal with nothing more than the sufficiency of a legal process as the basis for a criminal proceeding.

In *Hurtado* v. *California,* 110 U.S. 516, 4 S.Ct. 111 (1884), the only issue raised was whether a defendant could be prosecuted based on an information rather than an indictment. This Court held that the indictment requirement of the Fifth Amendment did not apply to the States. Not only was the issue totally irrelevant to what is argued here, but it is significant to note that under the law of California, an information could be filed only after examination and commitment by a magistrate, which examination consisted of the giving of testimony under oath by witnesses. *Id.* at 517-518, 4 S.Ct. at 112.

In *Albrecht* v. *United States*, 273 U.S. 1, 47 S.Ct. 250 (1927), the defendants had claimed that "because of defects in the information and affidavits attached, *there was no jurisdiction in the District Court . . .*" *Id.* at 4, 47 S.Ct. at 251. (emphasis added). This Court merely held that an illegal arrest did not deprive a court of jurisdiction. *Id.* at 8, 47 S.Ct. at 252. What this Court did not decide, and was not called upon to decide, was whether incarceration while the proceedings were going on would be illegal. *Id.* at 10, 47 S.Ct. at 253.

In *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 407 (1956), the issue for decision was whether a defendant could be required to stand trial where an indictment was based upon incompetent evidence. It was held that

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by a prosecutor, if valid on its face, *is enough to call for trial of the charge on the merits.*" *Id.* at 363, 76 S.Ct. at 409 (footnote omitted) (emphasis added).

Thus, *Costello's* application to the prosecutor's information situation goes no further than to permit trial on such an information. It certainly does not permit incarceration based on nothing more than a prosecutor's charge.

The holding of *Lawn* v. *United States*, 355 U.S. 339, 78 S.Ct. 311 (1959), is similarly limited to the sufficiency of a process to require a defendant to stand trial.

> ". . . one indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, *is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.*" *Id.* at 349, 78 S.Ct. at 317 (emphasis added).

As stated above, the question in this case is not whether a criminal prosecution may be based upon a prosecutor's information. The real question is whether such an information without a judicial determination of probable cause can justify the incarceration of respondents. The answer to that question must be in the negative.

The Fourteenth Amendment to the federal constitution prohibits any State from depriving any person of liberty without due process of law. This Court has held, with respect to other deprivations, that due process minimally requires a full hearing, substantially contemporaneous with the taking,* at which there is an opportunity to be heard before an independent and neutral decisionmaker. See, *e.g.*, *Mitchell* v. *W.T. Grant*, ... U.S. ....., 94 S.Ct. 1895, 1901, 1902 (1974) (property); *Fuentes* v. *Shevin*, 407 U.S. 67, 81, 82, 83, 92 S.Ct. 1983, 1994, 1995, 1996 (1972) (property); *Stanley* v. *Illinois*, 405 U.S. 645, 647, 649, 92 S.Ct. 1208, 1211 (1972) (custody of children); *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591 (1971) (driver's license); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971) (right to purchase liquor); *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268, 271, 90 S.Ct. 1011, 1020, 1022 (1970) (public assistance); *Sniadach* v. *Family Finance*

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* Some situations require that the hearing be held prior to the taking, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 266, 90 S.Ct. 1011, 1019 (1970), *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337, 341-342, 89 S.Ct. 1820, 1822 (1969), some that the hearing be held shortly after the taking, *e.g.*, *Mitchell* v. *W. T. Grant*, ... U.S. ...., ..., 94 S.Ct. 1895, 1901, 1902 (1974), depending on the nature of the competing interests. Amicus Curiae agrees with respondents that because of the nature of the criminal process it would not be feasible for the hearing to be required prior to arrest. A hearing held promptly after arrest would satisfy the requirements of due process while at the same time accomodating the governmental interest in the speedy apprehension of suspects.

Corporation, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823 (1969) (garnishment of wages).

More directly relevant, this Court has been equally solicitous with respect to the due process rights of persons whose right to conditional liberty is at issue. See, *e.g., Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593 (1972) (parolees); *Gagnon* v. *Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756 (1973) (probationers). Prior to final adjudication of their right to remain at liberty, parolees and probationers are entitled to a prompt preliminary hearing, before an independent decisionmaker, with a right to be heard on the question of whether there is probable cause. *Morrissey* v. *Brewer, id.* at 485-487, 92 S.Ct. at 2602-2603. Thus, the right to a preliminary hearing is not negated by the existence of procedures at a later time for a final determination of rights. See, also, *Fuentes* v. *Shevin, id.* at 81-82, 92 S.Ct. at 1995, 1996; *Bell* v. *Burson, id.* at 540, 91 S.Ct. at 1590.

With respect to the identity of the independent decisionmaker, and the standard to be applied by him, the Fourth Amendment is instructive. That provision protects the "right of the people to be secure in their persons . . . against unreasonable . . . seizures . . ." and regulates the making of arrests. An arrest must be based upon probable cause to believe that a crime has been committed and the person arrested has committed it. *Wong Sun* v. *United States,* 371 U.S. 471, 479, 83 S.Ct. 407, 413 (1963). This, then, is the standard against which the legality of a person's incarceration to answer to criminal charges must be measured.

Further, the Fourth Amendment requires that the independent decisionmaker be a "neutral and detached" magistrate. *Shadwick* v. *City of Tampa,* 407 U.S. 345, 348, 92

S.Ct. 2119, 2122 (1972). The State's Attorney is certainly neither an "independent decisionmaker" as required by due process* nor a neutral and detached magistrate as required by the Fourth Amendment. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 453, 91 S.Ct. 2022, 2031 (1970). See also *Shadwick* v. *City of Tampa, supra.*

The procedure followed by the State of Florida permits a prosecuting official in an *ex parte* proceeding to deprive respondents of their liberty by the filing of an information. This process provides neither the full hearing before an independent decisionmaker with opportunity to be heard required by the due process clause nor the neutral magistrate determining probable cause required by the Fourth Amendment. It therefore violates respondents' constitutional rights.

In *Ocampo* v. *United States*, 234 U.S. 91, 34 S.Ct. 712 (1912), the defendants did contest the use of a prosecutor's information as the basis for arrest as well as the basis for prosecution. However, that case did not resolve the question at issue here and contains several factors which make it substantially distinguishable from the case at bar.

The information in *Ocampo* included a sworn assertion by the prosecuting official that he had made a preliminary investigation, which included the examination of witnesses under oath, a procedure required by statute. *Id.* at 92-93, 34 S.Ct. at 712-713. Here of course there is no such statu-

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* In *Morrissey* v. *Brewer*, 408 U.S. 471, 486, 92 S.Ct. 2593, 2603 (1972), this Court explicitly excluded as an independent decisionmaker one who "has made the report of parole violation or has recommended revocation". Surely the prosecutor who has determined upon prosecution is in the same posture.

tory requirement. Petitioner has asserted in its brief that it is its "policy and practice" to conduct an independent examination. On oral argument, petitioner claimed that with respect to the individual respondents (although not with respect to the class), witnesses had been examined. Obviously, however, the safeguarding of constitutional rights cannot be made to depend upon "policy and practice" or the possibility that in a particular case a particular procedure will be followed.*

Second, *Ocampo* was decided before this Court held that the Fourth Amendment applied to the States. Thus, its holding that a prosecuting official may perform the "quasi-judicial" function of determining probable cause, *id.* at 98, 34 S.Ct. at 715, did not establish what was permissible under Fourth Amendment standards and has been overruled *sub silentio* by *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 453, 91 S.Ct. at 2031.

Third, the defendants in *Ocampo* had in fact posted bond, *id.* at 101, 34 S.Ct. at 716, and therefore the question of the legality of their continued incarceration was academic. This Court decided no more than that an initial arrest may be based on a prosecutor's information which itself is based on the examination of witnesses under oath. *Id.* at 100-101, 34 S.Ct. As argued above, however, due process requires much more to justify a continued incarceration, and the *Ocampo* decision is not controlling.

The interest of respondents in remaining free until a judicial officer or body has determined that they should be incarcerated is obviously at least as substantial as the in-

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* In any case, the issues should be determined on the record established in the lower courts. *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 476-477, 92 S.Ct. at 2598.

terest in public assistance, the purchase of liquor, a driver's license or conditional liberty. The accused is presumed innocent, and his liberty should not be taken without good cause. An accusation, even where brought by a prosecuting official, does not necessarily result in conviction.* Yet the deprivations resulting from loss of liberty can never be made good.

In addition, the defendant who remains incarcerated during the criminal proceedings is at a substantial disadvantage with respect to his ability to make a defense. His opportunity to consult with counsel is limited; his ability to assist in his defense by aiding in the investigation of his case is non-existent. It is well-known that because of crowded calendars and the substantial backing of criminal cases in most jurisdictions, the pre-trial detention period may extend for many, many months.

These hardships, which necessarily fall with greater impact upon the indigent or relatively indigent defendant who by definition is less able to obtain his liberty by posting bond, should not occur because of some assumption that the prosecutor will in good faith initiate only prosecutions which are well-founded. The prosecutor necessarily has an interest in obtaining criminal convictions, and he may well, whether from overzealousness or carelessness, institute proceedings as to which there is no probable cause. Even should a sufficient basis for prosecution and conviction ultimately develop, there has still been a deprivation of a substantial right which can never be cured. And, as indicated above, the mere fact of incarceration may well make it more likely that a prosecution will be

* In any event, the right to contest a preliminary detention at the time in no way hinges upon ultimate vindication. See *Fuentes* v. *Shevin*, 407 U.S. 67, 87, 92 S.Ct. 1983, 1997-1998 (1972).

successful, thus creating what is tantamount to a self-fulfilling prophecy. R. Kasanof and E. Single, "The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City", 8 Crim. L. Bull. 459 (1972); Wise, "Bail Reform in American Cities", 9 Crim. L. Bull. 770, 785-6 (1973).

This is not to say that every arrested defendant has an absolute right to liberty until and if he is convicted. But it is to say that the deprivation of liberty should not continue unless a neutral magistrate, after a full hearing, has determined that there is probable cause to hold him.

We ask this Court to accord to arrested defendants the same rights which it has granted to parolees, probationers, possessors of property and beneficiaries of public assistance—the right to a prompt and full hearing before a neutral and detached magistrate before he is deprived of his freedom.

CONCLUSION

For the above reasons, Amicus Curiae, the National Legal Aid and Defender Association, respectfully urges that the judgment of the lower court be affirmed.

Respectfully submitted,

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